Supreme Court, U.S.
FILED

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOE CLASS, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, AND MARK W. BARNETT, ATTORNEY GENERAL, STATE OF SOUTH DAKOTA,

Petitioners,

v.

WILLIE WILLIAMS, III,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE EX POST FACTO CLAUSE PROHIBITS REVOCATION OF AN INMATE'S GOOD TIME CREDITS AS PUNISHMENT FOR A PAROLE VIOLATION, UNDER STATUTORY AUTHORITY ENACTED IN 1983, WHICH WAS AFTER THE INMATE'S 1981 CRIMINAL CONVICTION, BUT WAS PRIOR TO HIS 1987 PAROLE VIOLATION?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, Joe Class, Warden, South Dakota State Penitentiary, and Mark W. Barnett, Attorney General, State of South Dakota, hereby respectfully pray that a writ of certiorari issue to review the judgment and opinion the Eighth Circuit Court of Appeals entered in the above-entitled proceeding of August 31, 1994.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	vii
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
FEDERAL QUESTIONS PRESENTED BELOW	7
REASONS FOR GRANTING THE WRIT	
I. THE DECISION OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT DIRECTLY CONFLICTS WITH THE DECISION OF THE SOUTH DAKOTA SUPREME COURT.	10
II. THE DECISION OF THE EIGHTH CIRCUIT OF APPEALS CONFLICTS WITH THE DECISION OF SEVERAL OTHER CIRCUIT COURTS.	20
CONCLUSION	26

TABLE OF AUTHORITIES

FEDERAL CASES:	PAGE
Baldwin v. Alabama, 472 U.S. 372 (1985)	10
Braxton v. United States, 500 U.S. 344 (1991)	10
Dace v. Mickelson, 816 F.2d 1277 (8th Cir. 1987)	15
Ewell v. Murray, 11 F.3d 482 (4th Cir. 1993)	21, 22
Greenfield v. Scafati, 277 F.Supp. 644 (D.Mass. 1977) aff'd mem., 390 U.S. 713 (1968)	passim
Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979)	15
Jones v. Murray, 962 F.2d 302 (4th Cir. 1992)	21
Malloy v. South Carolina, 237 U.S. 180 (1915)	19
McElroy v. United States, 455 U.S. 642 (1982)	20
United States v. Bermudze, 974 F.2d 12 (2d Cir. 1992)	23
United States v. Blackston, 940 F.2d 877 (3rd Cir 1991)	24
United States v. Celestine, 905 F.2d 59 (5th Cir. 1990)	24

United States v. Green, 810 F.2d 999
(11th Cir. 1986) 24

United States v. Paskow, 11 F.3d 873
(9th Cir. 1993) 21

United States v. Patterson, 820 F.2d 1524
(9th Cir. 1987) 25

United States v. Schramm, 9 F.3d 741
(9th Cir. 1993) 22, 23, 24

Weaver v. Graham, 450 U.S. 24
(1981) 7, 12, 13, 19

Williams v. Lee, 33 F.3d 1010
(8th Cir. 1994) passim

STATE CASES:

State v. Williams, 400 S.E.2d 181
(S.C. 1991) 5

Williams, Matter of, 488 N.W.2d 667
(S.D. 1992) passim

Winters v. Solem, 444 N.W.2d 722
(S.D. 1989) 15

STATUTORY REFERENCES:

28 U.S.C. § 2254 1, 8

28 U.S.C. § 2254(1) 2

SDCL 24-2-18 18

SDCL 24-15-21 3

SDCL 24-15-24 2, 4, 7, 9

OTHER:

U.S. Const. art. I, § 10 2

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 33 F.3d 1010 (8th Cir. 1994) and is reprinted in the Appendix hereto at A-1. The memorandum decision of the District Court for the Southern District of South Dakota (Jones, John B.) has not been reported. It is therefore reported in the Appendix at A-6. The opinion of the South Dakota Supreme Court was delivered on July 1, 1992 and appears at 488 N.W.2d 667 (S.D. 1992). It is set out at Appendix A-15.

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOE CLASS, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, AND MARK W. BARNETT, ATTORNEY GENERAL, STATE OF SOUTH DAKOTA,

Petitioners,

v.

WILLIE WILLIAMS, III,

Respondent.

JURISDICTIONAL STATEMENT

Invoking federal jurisdiction under 28 U.S.C. § 2254, Respondent Williams brought a Petition for Writ of Habeas Corpus in the District Court for Southern District of South Dakota. On July 23, 1993, the District Court granted Respondent's Motion for Summary Judgment and for other relief. See App. A-17, infra.

In an opinion issued on August 31, 1994, the Eighth Circuit Court of Appeals entered judgment affirming the Southern District's order and directed that Respondent be released from custody subject to the resolution of any detainers that were pending against him. The Petitioner's request for rehearing was denied by the court in an order dated October 20, 1994.

The jurisdiction of this court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, section 10, states:

> "No State shall...pass any... ex post facto law."

The statute at issue here, SDCL 24-15-24, as amended in 1983, states:

> If the board of pardons and paroles is satisfied that any provision of § 24-15-20 has been violated, it may

> revoke the parole and reinstate the terms of the original sentence and conviction or it may modify conditions of parole and restore parole status. In addition, the board is authorized to order the reduction of time in full or in part for good conduct granted under § 24-5-1. If the board does not find that the provisions of § 24-15-20 have been violated, it may restore the parolee to the original or modified terms and conditions of his parole.

(SL 1983, ch. 201). SDCL 24-15-21, as revised in 1986 (SL 1986, ch. 209) states:

> If the executive director of the board is satisfied that any provision of § 24-15-20 has been violated, the executive director may issue a warrant to the warden of the penitentiary, any law enforcement officer, or any parole agent, directing that the parolee named be arrested and returned to the state penitentiary under the term of his original conviction and sentence, pending a hearing on the alleged violations. On the issuance of the warrant, the running of the parole supervision time shall be suspended until the board has entered its final order on the revocation. The board shall credit the inmate with time spent in custody as a result of the parole violation.

STATEMENT OF THE CASE

In this case, the State of South Dakota seeks review of the determination of the Eighth Circuit Court of Appeals that revocation of Respondent's good-time credits for a violation of his parole, pursuant to SDCL § 24-15-24, violated the ex post facto clause.

The relevant facts are as follows. Respondent was convicted of first degree rape in December 1981 and was sentenced to fifteen (15) years in the state penitentiary. Matter of Williams, 488 N.W.2d 667, 668 (S.D. 1992); App. A-32. In 1983, the South Dakota Legislature amended SDCL 24-15-24 to authorize the Board of Pardons and Paroles to order the reduction of time granted for good conduct in the event of a parole violation.

When Respondent was later released on parole on December 21, 1984, he signed a standard parole agreement wherein he

acknowledged that "in the event I am returned to the institution, and my parole is revoked, I understand that I may lose any or all of my good time." Matter of Williams, 488 N.W.2d at 668; App. A-33. After signing the aforementioned parole agreement, Williams was allowed to return to his home state of South Carolina.

On August 21, 1987, Williams was convicted in South Carolina of writing a fraudulent check. The South Dakota Board of Pardons and Paroles was informed of that conviction on February 2, 1988, and issued a warrant for Williams arrest. Matter of Williams, 488 N.W.2d at 668; App. A-34. At the time the Board issued its arrest warrant, Williams had again been arrested in South Carolina and charged with first degree murder. State v. Williams, 400 S.E.2d 181 (S.C. 1991).

William's subsequent murder conviction was reversed in January 1991, and the case was remanded for a new trial. After learning that

Williams was again awaiting trial in South Carolina, the South Dakota State Penitentiary contacted the Charleston County Jail and informed it of the warrant that had been issued for his arrest. Matter of Williams, 488 N.W.2d at 668; App. A-34. When Williams later posted bond in South Carolina, authorities there detained him pursuant to the South Dakota warrant. He was returned to South Dakota on April 3, 1991.

A hearing was held before the South Dakota Board of Pardons and Paroles on April 26, 1991, to determine whether Williams' parole status should be revoked. During this hearing, Williams admitted that he had been convicted of passing a fraudulent check. Matter of Williams, 488 N.W.2d at 669; App. A-35. An order was therefore entered revoking Williams' parole. In addition, the Board ordered the loss of six years good time

credit. Matter of Williams, 488 N.W.2d at 670; App. A-35.

FEDERAL QUESTION PRESENTED BELOW

The constitutional question presented to the State Supreme Court was whether application of the 1983 version of SDCL 24-15-24 constituted a violation of the ex post facto clause. Matter of Williams, 488 N.W.2d at 670; App. A-40. Quoting Weaver v. Graham, 450 U.S. 24 (1981), the South Dakota Supreme Court held that in order for a penal law to be considered ex post facto, it "must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it."

A majority of the court concluded that SDCL 24-15-24 was not applied retrospectively in this case. Matter of Williams, 488 N.W.2d at 670; App. A-41. The majority found that the statute was enacted and in effect before

Williams was convicted of passing fraudulent checks in 1987, the offense which caused the application of the 1983 statute permitting the revocation of his good time. There was thus no valid ex post facto objection.[1]

An application for writ of habeas corpus pursuant to 28 U.S.C. § 2254 was thereafter filed by Williams in United States District Court on October 16, 1992, raising this same ex post facto challenge. In its memorandum opinion issued on July 23, 1993, the district court rejected the findings of the State Supreme Court and ordered that Williams' petition for writ of habeas corpus be granted. Relying on Greenfield v. Scafati, 277 F.Supp.

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[1]Applying the same analysis, the State Supreme Court concluded that SDCL 24-15-21, which suspended the running of Williams' parole supervision time, upon the issuance of an arrest warrant by the Parole Board had also not been applied retroactively. Matter of Williams, 488 N.W.2d at 670; App. A-39. That statute was found to have been applied to Williams parole violation in 1987.

644 (D.Mass. 1967) aff'd mem. 390 U.S. 713 (1968), the district court held that application of SDCL 24-15-24 in the instant case violated the constitutional prohibition against ex post facto laws. App. A-27-30. The facts in that case were said to be analogous to those here in that Scafati involved a Massachusetts' statute passed after Petitioner was sentenced but before he was paroled. The statute was invoked upon Petitioner's violation of parole and return to prison.

The state appealed to the Eighth Circuit on August 11, 1993. In an opinion issued on August 31, 1994, the Eighth Circuit upheld the district court. Williams v. Lee, 33 F.3d 1010, 1012 (8th Cir. 1994); App. A-9. The Eighth Circuit indicated that it was constrained to hold that SDCL 24-15-24 was applied retrospectively in violation of the ex post facto clause. Id. at 1014; App. A-15,

stating that other federal courts had uniformly followed Scafati.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT DIRECTLY CONFLICTS WITH THE DECISION OF THE SOUTH DAKOTA SUPREME COURT.

The State requests this Court to grant certiorari in this case on the basis of a clear and unequivocal conflict between the Supreme Court of the State of South Dakota and the Court of Appeals for the Eighth Circuit regarding whether the ex post facto clause precludes the application in this case. The decision of this Court of Appeals creates almost insurmountable difficulties in the operation of the prison system of the state of South Dakota and of any other state affected by the decision of the Court of Appeals for the Eighth Circuit. See generally, Braxton v.

United States, 500 U.S. 344, 347 (1991); Baldwin v. Alabama, 472 U.S. 372, 374 (1985).

The nature of the conflict giving rise to grounds for grant of the certiorari is as follows.

In Matter of Williams, 488 N.W.2d at 670, the South Dakota Supreme Court traced the chain of events in the Williams story, and held "there was no retrospective application of the 1983 statute" in that the "1983 statute was enacted and in effect when Williams was paroled in 1984." Id. The Court rejected Williams' argument that the statute was being applied to his 1981 conviction holding that the statute was applied to the 1987 parole violation: his conviction in South Carolina for writing a fraudulent check. Id.

The Eighth Circuit in Williams v. Lee, 33 F.3d 1010, 1014 (8th Cir. 1994) came to precisely the opposite conclusion on the same facts. The Court of Appeals determined that

"South Dakota's application to Williams of the good-time forfeiture provision violates the ex post facto clause." Id.

Essentially, the South Dakota Supreme Court and the Eighth Circuit Court of Appeals disagreed as to whether this case is controlled by this Court's summary affirmance in Greenfield v. Scafati, 277 F.Supp. 644 (D.Mass. 1977) (three judge panel) aff'd mem., 390 U.S. 713 (1968), or the Court's later opinion in Weaver v. Graham, 450 U.S. 24 (1981).

The Eighth Circuit found that the 1968 Memorandum Decision in Scafati controlled this litigation; the South Dakota Supreme Court's decision is premised on the later Weaver v. Graham decision.

The State submits that Scafati, has been undermined by this Court's plenary decision in Weaver v. Graham, 450 U.S. at 29, in which this Court established that, for the ex post

facto ban to be applicable, the law must be retrospective, that is, it must apply to events occurring before its enactment. Here the law is not "retrospective." Instead, the 1983 Amendment was applied only to events occurring after that date.

In this case, Petitioner was not paroled until 1984, did not sign his parole agreement until 1984, and did not violate his parole until three years later in 1987.

The parole violation in 1987 caused application of the 1983 statute. The Court of Appeals attempted to distinguish our case and Weaver by quoting Weaver to the effect that what was critical to relief under the ex post facto clause is

> the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.

Williams v. Lee, 33 F.3d at 1013, citing Weaver, 450 U.S. at 30, 101 S.Ct. at 965.

The court of appeals found essentially that the phrase "when the crime was consummated" necessarily referred to the time when the prisoner had committed the original criminal acts for which he was imprisoned and not the subsequent act(s) giving rise to the parole violation. Williams, 33 F.3d at 1013. (Emphasis added.) This analysis, however, is flawed. The Eighth Circuit's determination prevents the State from addressing the violation of the conditions of the supervised release separately from the criminal conduct which led to the prisoner's original incarceration. This Court's ex post facto jurisprudence does not so dictate. The South Dakota Supreme Court recognized the inherent distinction in its finding that Williams was, in reality, being punished for his 1987 parole violation and not his 1981 conviction. Matter of Williams, 488 N.W.2d at 670.

It must be remembered that Williams has no constitutional right to parole. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 7 (1979). See also Dace v. Mickelson, 816 F.2d 1277, 1281 (8th Cir. 1987) (South Dakota statute does not create protected liberty interest in parole). The release of an inmate on parole is purely discretionary. Indeed, the South Dakota Parole Board, like all state parole boards, is empowered by statute to place a number of restrictions upon the parolee prior to his release.[2] The inmate, of course, is not required to accept a conditional parole. Winters v. Solem, 444 N.W.2d 722, 723 (S.D. 1989). Having done so, Williams was required

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[2]Statute provides, in pertinent part, that: the board may place reasonable restrictions upon the parolee which are designed to continue his rehabilitation.... All restrictions shall be in writing and shall be agreed to and signed by the parolee. SDCL 24-15-11.

by state law to abide by the conditions imposed by the parole board. It was his subsequent violation of the conditions of his supervised release rather than the original conviction which led to the revocation of his good time.

Another difficulty with the decision of the Eighth Circuit in this case is that it fails to consider the effect on prison administration.

Taken to its apparent logical conclusion the impact of the Eighth Circuit's decision could severely limit the ability of prison officials to enact or amend rules which proscribe unsatisfactory conduct within a correctional institution, and would impose unjustified constraints on the state legislative process.

For example, if a new regulation is needed to deal with the misuse of computers, it will be argued that it cannot be applied to

those convicted before the regulation was promulgated. Similarly, when it becomes apparent to the prison officials that additional regulations are needed to control other various types of disruptive behavior, the regulations will be argued not to be applicable to existing inmates.

The alternative arguably demanded by the Eighth Circuit opinion is application of different sanctions to different groups of prisoners and creation of hierarchies of punishment within the prison with regard to different prisoners. It is, however, simply not feasible, from the standpoint of prison order, to run an institution in which some inmates are wholly or partially immune from punishment for conduct for which others receive serious penalties.

The apparent impact of the Eighth Circuit's analysis on both the prison administration and the state legislative

process can also be concretely demonstrated by reference to recently amended South Dakota law. In 1993, the South Dakota legislature authorized the State to revoke the accumulated good time of an inmate who, while incarcerated, evinces an intent to reoffend upon release. SDCL 24-2-18. Under the South Dakota Supreme Court's interpretation of the ex post facto clause, this statute may be applied to any inmate who evinces such intent at any time after the statute was enacted, thus treating all inmates alike.

The Eighth Circuit's ex post facto analysis, on the other hand, appears to allow the application of this statute only to those inmates convicted of the underlying crime after this statute was enacted. Under this analysis, two inmates evincing the same intent to reoffend after enactment of the statute may be subject to vastly different treatment within the institution. Only one of the

inmates would be subject to discipline through loss of good time.

The prospect of different rules governing the behavior of different inmates within the institution, would create insurmountable difficulties in prison management, and may effectively stifle the state legislative process. In the interest of effective prison management, the state legislature may be precluded from enacting laws to respond to changing conditions within the institution and in society. The purpose of the ex post facto clause is to restrain arbitrary and potentially vindictive legislation, not to frustrate the legitimate legislative process operating in the interest of society as a whole. Weaver v. Graham, 450 U.S. at 29, (citing Malloy v. South Carolina, 237 U.S. 180, 183 (1915)).

The decision of the South Dakota Supreme Court allows rational management of the state

prison systems; the conflicting decision of the Eighth Circuit Court of Appeals threatens prison management.

II

THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISION OF SEVERAL OTHER CIRCUIT COURTS.

Certiorari is also appropriate to resolve the conflict between the decision of the Eighth Circuit Court of Appeals and the decisions of various other circuit courts. See, e.g., Supreme Court Rule 10.1(a); McElroy v. United States, 455 U.S. 642, 643 (1982).

As noted above, the Eighth Circuit Court of Appeals in the instant litigation held that a state law enacted after a defendant's conviction but before the grant of parole could not be applied to violation of that parole. The holding was premised on the erroneous belief that this case was dictated by Greenfield v. Scafati, 277 F.Supp. 644 390

U.S. 713, (D.Mass. 1967) aff'd mem., 88 S.Ct. 1409, 20 L.Ed.2d 250 (1968). The Eighth Circuit Court, relying on United States v. Paskow, 11 F.3d 873 (9th Cir. 1993), stated that other federal courts uniformly have followed Scafati and that it was therefore constrained to do the same. Williams v. Lee, 33 F.3d at 1014.

In fact the federal courts have been anything but "uniform." In Ewell v. Murray, 11 F.3d 482 (4th Cir. 1993) certain prisoners claimed violation of the ex post facto clause when the state imposed a "loss of good-time credits" on an inmate who refused to provide a blood sample. 11 F.3d at 45. The prisoner's underlying offenses had been committed in 1986 and 1987 and the law and regulations at issue were promulgated in 1991 and 1992.

The Fourth Circuit Court of Appeals, relying on an earlier decision of the same circuit, Jones v. Murray, 962 F.2d 302 (4th

Cir. 1992) (cert. denied ___ U.S. ___, 113 S.Ct. 472 (1992) found that the regulation "does not violate the ex post facto clause." The court found that the "penalties for prospective violations by the inmates" may be increased by the law even if they involve the "loss of good-time credit." 11 F.3d at 486. According to the Court, the amended guidelines did not add to the punishment for which the inmate was incarcerated but were only for "new conduct constituting a violation of prison regulation." 11 F.3d at 487.

Similarly, the Ninth Circuit Court of Appeals has rendered a decision squarely in conflict with that of the Eighth Circuit. In United States v. Schramm, 9 F.3d 741 (9th Cir. 1993) the court considered a case in which the defendant had plead guilty in 1988 and had been sentenced to thirty-seven months imprisonment and three years of supervised release. At the time of sentencing, the

applicable guidelines were silent as to whether the sentence imposed upon revocation of supervised release was to run concurrently or consecutively with the sentence imposed for the new criminal offense. After the sentencing, however, the sentencing guidelines were amended to provide that any term of imprisonment imposed upon revocation of supervised release was to be served consecutively to any sentence the defendant was serving.

Because the guidelines had been amended before the defendant violated the terms of the supervised release, the court found that there was no ex post facto violation. According to the court, the guidelines were not applied "retroactively" because they were not applied to conduct completed prior to their enactment. United States v. Schramm, 9 F.3d at 743. In so holding, the court relied in part in United States v. Bermudze, 974 F.2d 12, 14 (2d Cir.

1992) in which the Court of Appeals for the Second Circuit had held that a violation of the supervised release was, for the purposes of the ex post facto clause, an offense separate from the offense that led to the initial imprisonment. United States v. Schramm, 9 F.3d at 743.

This same result has been reached by a number of other circuits. See, e.g., United States v. Blackston, 940 F.2d 877, 882 n.7 (3rd Cir. 1991) (violation of supervised release is a separate offense...) cert. denied ____ U.S. 112 S.Ct. 611, 116 L.Ed.2d 634 (1991), United States v. Celestine, 905 F.2d 59, 60 (5th Cir. 1990) (Imprisonment for violation of supervised release term does not extend primary prison term.)

The Eleventh Circuit Court of Appeals in United States v. Green, 810 F.2d 999, 1000 (11th Cir. 1986) found that a statute increasing a sentence for a felon in possession of a

firearm could be held applicable to an offender because the possession occurred after the effective date.[3] The same result was later reached in United States v. Patterson, 820 F.2d 1524, 1527 (9th Cir. 1987) where the Ninth Circuit Court of Appeals concluded that a statute increasing the sentence for possession of a firearm while on bail could be applied to one already on bail provided that possession occurred after the effective date.

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[3]Indeed, while the Eighth Circuit Court of Appeals in this case found itself to be compelled by the 1968 summary affirmance in Scafati, its earlier cases indicate adherence to the position ultimately adopted by the South Dakota Supreme Court. See, e.g. Munger v. Erickson, 979 F.2d 1323, 1325 (8th Cir. 1992) (amended sentencing guidelines were in effect before defendant committed subsequent offense and he was therefore unnoticed at previous felony convictions would be counted at felonies in future sentencing proceedings); Schwindling v. Smith, 777 F.2d 431, 433 (1985) (statute lengthening time before prisoner would become eligible for parole because the fourth offender status did not violate ex post facto clause where a crime for which he was incarcerated was committed after enactment of the statute); Garner v. Howell, 840 F.2d 660 (8th Cir. 1988).

Unlike the Eighth Circuit Court of Appeals, these courts, as well as the South Dakota Supreme Court recognized that the triggering event was not the original offense, but rather the commission of a new infraction, one that occurred after the ineffective date of the statute.

CONCLUSION

For the foregoing reasons, Petitioners respectfully requests this Court to grant the Petition for Writ of Certiorari.

Dated this 18th day of January, 1995.

Respectfully submitted,

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APPENDIX

APPENDICES

A. Opinion of the Court of Appeals for the Eighth Circuit is reported at 33 F.3d 1010 (8th Cir. 1994). A-1

B. Memorandum decision of the District Court for the Southern District of South Dakota (Jones, John B.) has not been reported. It is therefore reported in the Appendix at A-6. A-17

C. Opinion of the South Dakota Supreme Court was delivered on July 1, 1992 and appears at 488 N.W.2d 667 (S.D. 1992). A-32

D. Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc A-58

Appendix A

WILLIE WILLIAMS, III,

Appellee,

v.

STEVEN W. LEE, WARDEN, SOUTH DAKOTA STATE PENITENTIARY; MARK W. BARNETT, ATTORNEY GENERAL, STATE OF SOUTH DAKOTA,

Appellants.

No. 93-3063.

United States Court of Appeals,
Eighth Circuit.

Submitted May 9, 1994.

Decided Aug. 31, 1994.

Before BOWMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

After Willie Williams, III, who currently is confined at the South Dakota State Penitentiary, violated his parole, the state of South Dakota, acting on the authority of legislation enacted after Williams had committed the offense that resulted in his conviction and sentence, revoked his accumulated good-time credits. The District

Court[1] concluded that the state thereby had violated the Ex Post Facto Clause, and it granted Williams a writ of habeas corpus. The state appeals. We affirm.

I.

In December 1981, Williams pleaded guilty in a South Dakota state court to first-degree rape. See Williams v. State, 349 N.W.2d 58 (S.D. 1984). He was sentenced to fifteen years. Despite the violent nature of his crime, Williams was placed on parole in December 1984 after a mere three years in prison. With credit for his good time, Williams' parole was to expire in October 1990.

In 1983, while Williams was still in prison in South Dakota, the state added a provision to its parole laws stating that, if

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[1]The Honorable John B. Jones, United States District Judge for the District of South Dakota.

a parolee violates the terms of his parole, the South Dakota Board of Pardons and Paroles (the Board) is "authorized to order the reduction of time in full or in part [that was granted] for good conduct." S.D.Codified Laws Ann. § 24-15-24 (1988). In the parole agreement Williams signed in connection with his release to parole status, he acknowledged he was aware that, were he to violate his parole, he could lose all of his good-time credits. In 1986, the state again added a provision to its laws, this time to provide that, "[u]pon issuance of [an arrest] warrant, the running of the parole supervision time shall be suspended until the board has entered its final order on the revocation." Id. § 24-15-21 (Supp. 1994).

After being placed on parole, Williams went to South Carolina, where in August 1987 he was convicted of writing a fraudulent check. For this crime South Carolina placed

Williams on probation for one year and ordered him to make restitution. Back in South Dakota, the Board issued an arrest warrant for Williams when it learned in February 1988 of his fraudulent check conviction.

By the time of the Board issued the arrest warrant, however, Williams was in jail once again, having been taken into custody in December 1987. The place again was South Carolina, the charge, this time, first-degree murder. In May 1988, Williams was convicted of the first-degree murder of Zenaida Albury. Williams's murder conviction, was reversed in January 1991, however, and his case was remanded for a new trial. State v. Williams, 303 S.C. 274, 400 S.E.2d 131 (1991).

When South Dakota learned the next month, in February 1991, that Williams again was awaiting trial, it informed South Carolina that it had issued a warrant for Williams's arrest. When Williams posted bond in South

Carolina, authorities there detained him pursuant to the South Dakota warrant and returned him to that state in April 1991, six months after Williams's parole originally was to have expired.

Later that April the Board held a parole revocation hearing. Williams admitted at the hearing that he had been convicted of passing a fraudulent check. The Board concluded that Williams had violated the terms of his parole, and it revoked the parole and Williams's six years of good-time credit. Williams's new release date was to be in October 1996, upon the completion of his fifteen-year sentence on his South Dakota rape conviction.

Williams challenged the Board's actions in state court, claiming that the Board's application to him of the 1983 and 1986 statutory modifications each worked a violation of the Ex Post Facto Clause of the United States Constitution. U.S. Const. art.

I, § 10, cl. 1. The state argued that Williams had notice that he could lose his good-time credits if he violated the terms of his parole, and that Williams's loss of his good-time credits, and the resulting extension of his sentence, were direct consequences of his parole violation and thus were based on conduct that occurred after the change to the state law was made. A similar argument was made by the state with respect to the 1986 tolling provision. The South Dakota Supreme Court ultimately agreed with the state's position and upheld the Board's actions. In re Williams, 488 N.W.2d 667 (S.D. 1992).

Williams then filed his petition in the District Court for a writ of habeas corpus, raising the same ex post facto challenges. The court concluded that the application of each statutory provision to Williams violated the ex post facto prohibition and granted Williams's petition. The state appeals.

II.

[1,2] A state violates the Ex Post Facto Clause of the federal constitution if it attempts to punish as a crime an act that was not criminal when done, removes a defense available when the act was committed, or increases the punishment for a crime after it was committed. Collins v. Youngblood, 497 U.S. 37, 42-43, 110 S.Ct. 2715, 2719, 111 L.Ed.2d 30 (1990). For a law to run afoul of this ban, "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981) (footnote omitted).

In Greenfield v. Scafati, 277 F.Supp. 644 (D.Mass. 1967) (three-judge court), aff'd mem., 390 U.S. 713, 88 S.Ct. 1409, 20 L.Ed.2d 250 (1968), the court considered whether a state violated the ex post facto ban when it

applied to a prisoner a law passed after the prisoner had been incarcerated but before he had been paroled. The law at issue stated that, upon revocation of a prisoner's parole, the prisoner was not eligible to accumulate good-time credits during the first six months of his reincarceration. The court held the law to be ex post facto, reasoning that the law applied to the punishment that had been imposed on the prisoner as a result of his initial offense, and thus was retroactive, and that the law disadvantaged him because it operated to increase the time he ultimately would be required to spend in prison. The opinion of the three-judge district court was affirmed summarily by the Supreme Court.

The Fifth Circuit applied Greenfield's principles in Beebe v. Phelps, 650 F.2d 774 (5th Cir. Unit A July 1981) (per curiam), a case that presented facts virtually identical to those of the case before us--the law at

issue, which had been enacted after the prisoner's conviction but before his parole, provided that he would forfeit a portion of his good-time credits were his parole revoked. The court held that the application of the law worked an ex post facto violation when applied to the prisoner because the offense for which the prisoner's parole had been revoked carried its own sentence, while the good-time forfeiture extended the time remaining to be served on the prisoner's original sentence. Other federal courts uniformly have followed Greenfield. See, e.g., United States v. Paskow, 11 F.3d 873 (9th Cir. 1993); Fender v. Thompson, 883 F.2d 303 (4th Cit. 1989).

As existing Supreme Court precedent, Greenfield dictates the result we reach today. Were it not for the 1983 statutory change allowing the Board to revoke Williams's good-time credits, Williams's sentence would have expired in October 1990. By operation of the

law at issue here, Williams would be required to remain in prison until October 1996. Because the law Williams challenges increases his punishment, it is being applied to his detriment.[2] It also is being applied retroactively, because the law extends the term Williams must serve on his South Dakota rape conviction, and does not constitute a punishment for his South Carolina fraudulent check offense (South Carolina already has punished Williams for that offense).

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[2]The state argues that, even before the 1983 statutory change, the Board was authorized to revoke a prisoner's good-time credits if the prisoner committed a parole violation. Therefore, it concludes, the statutory change cannot have disadvantaged Williams. See Burnside v. White, 760 F.2d 217 (8th Cir.), cert. denied, 474 U.S. 1022, 106 S.Ct. 576, 88 L.Ed.2d 559 (1985). It is uncontroverted, however, that at the time Williams committed the offense of conviction the Board lacked explicit statutory authority to revoke good-time credits, see In re Williams, 488 N.W.2d 667, 670 (S.D. 1992), and the state has not made a persuasive showing that the Board otherwise had such authority at that time.

The state contends that Greenfield no longer is good law in light of Weaver, and that we should hold that the application of the 1983 revocation law to Williams was not ex post facto because Williams was on notice of the change and it was his actions after the enactment of the 1983 law that led to the revocation of his good-time credits. In Weaver, the Supreme Court invalidated as ex post facto Florida's change in its method for calculating good-time credits for all of its prisoners, a change that reduced the amount of good-time credits prisoners would receive. As the state points out, the Weaver Court explained that, "[c]ritical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint." Weaver, 450 U.S. at 30, 101 S.Ct. at 965. Because the Weaver Court expressed concern about the prisoners' lack of notice, a

concern not mentioned in Greenfield, the state concludes that adherence to Greenfield is not justified here, where Williams knew that if he violated the terms of his parole he could lose his good-time credits. We cannot agree.

First and foremost, in Weaver the Supreme Court held that Greenfield still is controlling authority. The majority opinion in Weaver discussed Greenfield and cited that case with approval. Id. at 34, 101 S.Ct. at 966. And in his opinion concurring in the judgment, Justice Blackmun, joined by Chief Justice Burger, explained that he joined the judgment of the Court only because he felt bound to do so by Greenfield and Lindsey v. Washington, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937). Weaver, 450 U.S. at 37, 101 S.Ct. at 968 (Blackmun, J., concurring in the judgment).

[3] Second, the passage from Weaver quoted above actually is quite different when

quoted in full: "Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." Id. at 30, 101 S.Ct. at 965 (emphasis added). Thus, notice is relevant when the prisoner commits his criminal acts, not when he is paroled. In addition, although the Weaver Court discussed the importance of notice, of which the plaintiff-prisoners in that case had had none, the decision in Weaver was based not on the notice issue, but on the statute's retroactive application to the disadvantage of the prisoners. Id. at 31-34, 101 S.Ct. at 965-66.

Finally, the notice argument does not apply in the Greenfield line of cases in the same manner as it did in Weaver, for in the former cases the parolees were on at least

constructive notice as to the new consequences of a post-conviction violation, whereas in the latter case all prisoners--even if they did not commit a subsequent bad act--were affected by the new law. Other federal courts faced with Greenfield-type situations also have refused to accept the notice argument the state makes here. See, e.g., Paskow, 11 F.3d at 880 (noting that, to adopt the "notice" argument, a court "would be required to jettison twenty-five years of precedent"); Fender, 883 F.2d at 307 (holding that notice is irrelevant where "the challenged statute nevertheless accomplished an impermissible enhancement of the punishment for an earlier, unrelated crime"); Beebe, 650 F.2d at 776 (rejecting the argument that, because the prisoner had notice that he would forfeit a portion of his good time if his parole was revoked, the law was not ex post facto).

Based on Greenfield and its progeny, we

are constrained to hold that South Dakota's application to Williams of the good-time forfeiture provision violates the Ex Post Facto Clause. Having determined that the state could not constitutionally revoke Williams's good-time credits, we conclude that, regardless of whether the tolling provision was ex post facto as applied to Williams (an issue we need not and do not reach), Williams's sentence has expired.[3] Accordingly, Williams is entitled to a writ of habeas corpus.[4]

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[3]When the state issued Williams's arrest warrant in February 1988, Williams had 32 months remaining on his sentence (which was to expire in October 1990). Since April 1991, when the state re-incarcerated Williams after revoking his parole and good-time credits, more than 32 months have passed. Therefore, even assuming the tolling provision is valid as applied to Williams, he has served the time remaining on his sentence.

[4]Williams also argues that his parole had expired by the time the Board attempted to revoke it, and thus in revoking his parole the Board deprived him of his rights under the

(continued...)

III.

The judgment of the District Court granting Williams's petition for a writ of habeas corpus is affirmed. Subject to the resolution of any detainers that may be pending against Williams, he is to be released from the custody of the state of South Dakota.

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[4](...continued)
Fifth, Sixth, Eighth, Thirteenth, and Fourteenth Amendments. Our resolution of this case makes it unnecessary for us to reach these arguments.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

WILLIE WILLIAMS, III,	*	CIV. 92-4159
	*	
Petitioner,	*	
	*	
v.	*	
	*	
WALTER LEAPLEY, Warden, South Dakota State Penitentiary, and MARK W. BARNETT, Attorney General, State of South Dakota,	*	
	*	
Respondents.	*	

APPEARANCES:

For the Plaintiff. Mr. Douglas E. Hoffman
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For the Defendant. Mr. David O. Carter
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MEMORANDUM OPINION AND ORDER

Petitioner, Willie Williams, who is currently confined at the South Dakota State

Penitentiary, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. A hearing was held on May 24, 1993 to consider two pending motions: (1) Petitioner's Motion to Amend his Petition, and (2) Petitioner's Motion for Summary Judgment. The Court granted the first motion and took the second motion under advisement. After consideration of the record, briefs and arguments of counsel, the Court concludes that Petitioner is entitled to the relief sought. Accordingly, his Motion for Summary Judgment shall be granted.

Background

This case arises from Petitioner's parole revocation. Petitioner claims that the revocation, and his subsequent loss of good time credit, violates the Constitution's prohibition of ex post facto laws.

The facts of this case are set out in detail in In re Williams, 488 N.W.2d 667 (S.D.

1992). The following chronology emphasizes dates which are relevant to Petitioner's claims.

1. Williams was convicted of rape in South Dakota in 1981.
2. The South Dakota Legislature amended SDCL 24-15-24 in 1983 to provide that if the Board of Pardons and Paroles determined a parole violation had occurred, "the board is authorized to order the reduction of time in full or in part for good conduct granted under § 24-5-1."
3. Williams was paroled in December 1984.
4. The South Dakota Legislature amended SDCL 24-15-21 in 1986 to provide that the issuance of a warrant suspends the running of parole supervision time.
5. Williams was convicted of

"fraudulent checks" in South Carolina on August 21, 1987.

6. The South Dakota Board of Pardons and Paroles (Board) issued a warrant for Williams' arrest for alleged parole violations stemming from the "fraudulent check" conviction on February 2, 1988.

7. Unless the running of Williams sentence was tolled by the issuance of the 1988 warrant, under the "good conduct" provisions of SDCL 24-5-1, Williams sentence for the 1981 rape conviction was fully satisfied on October 14, 1990.

8. Williams was convicted of murder in South Carolina, and his conviction was reversed by the Supreme Court of South Carolina on January 7, 1991. State v. Williams, 303 S.C. 274, 400 S.E.2d 131.

9. Williams was returned to South Dakota in early April 1991.

10. The Board held a hearing and entered an order revoking Williams' parole on April 26, 1991 based on the 1987 "fraudulent check" conviction, and simultaneously revoked all six years of William's good time credits.

Petitioner contends that application of the 1986 version of SDCL § 24-15-21 to him, which served to toll his sentence upon the issuance of the arrest warrant, violates the ex post facto prohibition of the Constitution. He also argues that the Board lacked authority to revoke his good time credits absent the 1983 amendment of SDCL § 24-15-24, which expressly granted such authority, and that application of that amendment similarly violates the ex post facto clause. If Petitioner prevails on either claim, he is entitled to habeas corpus relief.

Discussion

The ex post facto prohibition[5] forbids Congress and the States to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." Cummings v. Missouri, 4 Wall. 277, 325-26, 71 U.S. 277, 325-26 (1867). "Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." Weaver v. Graham, 450 U.S. 24, 28-29 (1981); Burnside v. White, 760 F.2d 217 (8th Cir.), cert. denied, 474 U.S. 1022 (1985). The ban also restricts governmental power by restraining arbitrary

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[5]Article I of the United States Constitution provides that neither Congress nor any State shall pass any : "ex post facto Law." See Art. I, § 9, cl. 3; Art. I, § 10, cl. 1.

and potentially vindictive legislation. Weaver, 450 U.S. at 29; Burnside, 760 F.2d at 220.

Two elements must be present for a criminal or penal law to be ex post facto: "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Weaver, 450 U.S. at 28-29.

I. Tolling of sentence upon issuance of warrant

SDCL § 24-15-21 currently provides, in part, that: "Upon the issuance of [a] warrant, the running of the parole supervision time shall be suspended until the board has entered its final order on the revocation." The language was not added, however, until 1986; five years after Williams was convicted and two years after he was paroled.

Williams argues that the statute was

being applied to either his 1981 conviction or his 1984 parole. The South Dakota Supreme Court rejected Williams' argument. If found that the 1986 statute was applied to his 1987 parole violation:

> SDCL 24-15-21, including the provision regarding the suspension of parole supervision time, was enacted and in effect before Williams was convicted of passing fraudulent checks in South Carolina. Thus the 1986 statute was not being applied to conduct which occurred before its enactment.

In re Williams, 488 N.W.2d at 670. Accordingly, the court determined that there was no ex post facto violation because there was no retrospective application. Id. at 670.

The United States Supreme Court considered and rejected a similar argument in Weaver v. Graham, 450 U.S. at 31. The respondent in Weaver maintained that Florida's

1978 law altering the availability of gain time[6] was not retrospective because, on its face, it applied only after its effective date. The Court rejected the argument on the ground that it elevated form over substance:

> The critical question is whether the law changes the legal consequences of acts completed before its effective date. In the context of this case, this question can be recast by asking whether [the statute] applies to prisoners convicted for acts committed before the provision's effective date. Clearly, the answer is in the affirmative.... Thus, the provision attaches legal consequences to a crime committed before the law took effect."

Id. (citations omitted) (emphasis added).

The respondent also argued that Florida's revised gain-time provision was not retrospective because its predecessor was "no part of the original sentence and thus no part of the punishment annexed to the crime at the

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[6]Gain time is sometimes referred to as "good time." It refers to various kinds of time credited to reduce a prisoner's prison term for good conduct and obedience to prison rules. See generally SDCL § 24-5-1.

time petitioner was sentenced." Id. The Court also rejected this argument, finding that it was foreclosed by precedent. Id. at 32.

Although Weaver involved the computation of gain time, its principles are equally applicable in this case. Here, the conviction for which Williams was paroled occurred five years prior to the amendment of SDCL § 24-15-21. Clearly application of the tolling statute to Williams was retrospective.

It is equally clear that Williams was prejudiced as a result of the application of the 1986 statute to him. Had it not been for the tolling statute, his sentence would have been fully satisfied on October 14, 1990. Accordingly, I conclude that he is entitled to the relief sought. I shall nonetheless address the merits of the second issue raised by Petitioner because it, too, is a case of first impression for this Court.

II. **Revocation of Petitioner's Good Time Credits**

When Williams was convicted and sentenced the Board had no explicit statutory authority to reduce a parolee's good time credits because of a parole violation. In 1983, SDCL § 24-15-24 was amended to provide that if the Board determined a parole violation had occurred, "the board is authorized to order the reduction of time in full or in part for good conduct granted under § 24-5-1." Williams was paroled a year later. Upon his violation of parole and return to prison the statute was invoked. Williams argues that application of the statute was ex post facto. The Court agrees.

The facts in this case are analogous to Greenfield v. Scafati, 277 F.Supp. 644 (D. Mass. 1967) (three-judge court), aff'd, 390 U.S. 713 (1968). Scafati involved a Massachusetts statute which forbid prisoners

from earning good conduct deductions for the first six months after re-incarceration following violation of following of parole. The statute was passed after petitioner was sentenced but before he was paroled. The statute was invoked upon petitioner's violation of parole and subsequent return to prison.

The Scafati Court held that application of the statute to petitioner violated the constitutional prohibition against ex post facto laws. The three-judge panel was affirmed on appeal to the United States Supreme Court and the decision was cited by the Court in Weaver, 450 U.S. at 32. See also Story v. Collins, 920 F.2d 1247 (5th Cir. 1991) (if state computes good conduct time on basis of law that became effective after offense that resulted in prisoner's incarceration, and if computation is less favorable to the prisoner than computation he

would have received under law in effect on date he committed offense, the state violates the constitutional provision against ex post facto laws.); Parton v. Armontrout, 895 F.2d 1214 (8th Cir.), cert. denied, 498 U.S. 879 (1990) (application of current Missouri parole statute to inmate who was convicted of statutory rape in 1972, and required him to complete Missouri sex offender program before he could be eligible for parole violated ex post facto clause of Constitution); Raske v. Martinez, 876 F.2d 1496 (11th Cir.), cert. denied, 493 U.S. 993 (1989) (Florida statute that allowed prisoners to earn only 20 days per month of incentive gain-time constituted unconstitutional ex post facto law as applied to Florida inmate who was convicted of offenses that occurred prior to statute's passage); Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989) (statutes enacted or amended after prisoner was sentenced cannot be applied

to alter conditions of or revoke his pre-existing parole eligibility notwithstanding that conduct purportedly triggering application of statute occurred after its enactment).

Because Scafati is clearly controlling, I conclude that Petitioner is entitled to habeas corpus relief on this issue as well. Granting Petitioner habeas relief would ordinarily result in his release, but it appears in related litigation in this Court, Williams v. DeLano, CIV 93-4121 (D.S.D.), that South Carolina has filed a detainer seeking to return him to South Carolina for retrial of the murder conviction.

Therefore, upon the record herein,

IT IS ORDERED:

(1) That Petitioner's Motion to Amend his Petition, Doc. 16, is granted.

(2) That Petitioner's Motion for Summary Judgment, Doc. 20, is granted.

(3) That Petitioner's Petition for a Writ of Habeas Corpus, Doc. 1, is granted.

(4) That petitioner be released from custody on his South Dakota conviction after resolution of any detainers now pending against him.

Dated this 23rd day of July, 1993.

BY THE COURT.

/s/ John B. Jones
Chief Judge

ATTEST:

WILLIAM F. CLAYTON, CLERK
By /s/ Linda M. Ziegler
DEPUTY

APPENDIX C

IN THE MATTER OF THE REVOCATION OF THE PAROLE OF WILLIE WILLIAMS III.

NO. 17719.

Supreme Court of South Dakota.

Considered on Briefs March 19, 1992.

Decided July 1, 1992.

Rehearing Denied July 27, 1992.

MILLER, Chief Justice.

Willie Williams III (Williams) appeals a circuit court judgment affirming an order of the Board of Pardons and Paroles revoking his parole. We affirm the circuit court judgment.

FACTS

Williams was charged with first degree rape in October 1981. He was arrested and placed in jail on October 14, 1981. Williams was convicted of first degree rape in December 1981 and was sentenced to fifteen years in the state penitentiary.

SDCL 24-5-1 provides that inmates are

entitled to deduct specified amounts of time for each year of "good conduct." Up to six years of time could be deducted from Williams' sentence if he maintained "good conduct" while serving his sentence. Consequently, Williams' tentative "good conduct" release date was October 14, 1990.

On December 21, 1984, Williams was paroled from the 1981 rape sentence. Williams signed the standard parole "Agreement" which provided, in part: "In the event I am returned to the institution, and my parole is revoked, I understand that I may lose any or all of my Good Time." Under his parole agreement, Williams was allowed to move back to his home state of South Carolina.

On August 21, 1987, Williams was indicted and convicted of "Fraudulent Checks" in South Carolina. He was sentenced to one year in prison but the sentence was suspended. On February 2, 1988, the South Dakota Board of

Pardons and Paroles (hereinafter "the Board") was informed of the South Carolina conviction and issued a warrant for the arrest of Williams. No parole revocation hearing was held at that time.

Meanwhile, in May 1988, Williams was charged with murder in South Carolina. He was again taken into custody by South Carolina officials and was tried and convicted of murder. Williams remained incarcerated in South Carolina during his appeal of the murder conviction. The murder conviction was reversed and remanded on January 7, 1991. Williams was held in custody pending retrial.

On February 26, 1991, the South Dakota State Penitentiary sent a computer message to the Charleston County Jail informing them that the Board had issued a warrant for the arrest of Williams. The message specifically stated "THIS IS A "NO BOND" SITUATION! ! ! !"

Williams was entitled to post bond in

South Carolina pending his retrial on the murder charge. When Williams posted the requisite bond in South Carolina he was detained under the South Dakota warrant. Williams was returned to South Dakota on April 3, 1991.

Back in South Dakota, Williams was given notice that a parole revocation hearing would be held on April 26, 1991. During that parole revocation hearing, in response to direct questioning by the Board, Williams admitted that he had been convicted of "fraudulent checks" in South Carolina in 1987. The Board found that Williams had violated the terms of his parole and entered an order revoking Williams' parole with the loss of six years good time credits.

Williams appealed the order revoking parole to the circuit court. The circuit court affirmed the decision of the Board. Williams appeals to this Court.

DECISION

The following chronology emphasizes the important dates which are relevant to this appeal.

1. Williams was convicted of rape in South Dakota in 1981.

2. Williams was paroled in December 1984.

3. Williams was convicted of "fraudulent checks" in South Carolina on August 21, 1987.

4. On February 2, 1988, the Board of Pardons and Paroles issued a warrant for Williams' arrest for alleged parole violations.

5. Unless the running of Williams sentence was tolled by the issuance of the 1988 warrant, under the "good conduct" provisions of the South Dakota statutes, Williams' sentence for the 1981 rape conviction was fully satisfied on October 14, 1990.

6. Williams was arrested in South Carolina under the 1988 warrant and was returned to South Dakota in early April 1991.

7. The Board of Pardons and Paroles held a hearing and entered an order revoking parole on April 26, 1991 based on the 1987 "fraudulent check" conviction.

WHETHER THE ISSUANCE OF AN ARREST WARRANT FOR AN ALLEGED PAROLE VIOLATION SUSPENDED THE RUNNING OF WILLIAMS' PAROLE SUPERVISION TIME.

Williams argues that the Board had no authority to revoke his parole because he maintains his sentence had already been fully served. The Board contends that their February 2, 1988 warrant suspended the running of his parole supervision time. They rely on SDCL 24-15-21 which currently provides:

> If the executive director of the board is satisfied that any provision of § 24-15-20 has been violated, the executive director may issue a warrant to the department of corrections, any law enforcement officer, or any parole agent, directing that the parolee named be arrested. Pursuant to the provisions of § 24-15-23 the parolee may be returned to the state penitentiary. Upon the issuance of the warrant, the running of the parole supervision time shall be suspended until the board has entered its final order on the revocation. The board shall credit the inmate with time spent in custody as a direct result of the parole violation. (emphasis added).

Thus, the statute currently in effect clearly specifies that the issuance of a

warrant suspended the running of parole supervision time. Williams' case presents a special problem because that provision in the current version of SDCL 24-15-21 was not enacted until 1986, five years after Williams was convicted and two years after he was paroled. The version of the statute in effect when Williams was convicted and paroled did not contain the sentence which suspends the running of parole supervision time upon the issuance of a parole violation arrest warrant.

[1] Williams argues that the application of that 1986 version of the statute to him is a violation of the ex post facto prohibitions in the United States Constitution. Two elements must be present for a criminal or penal law to be considered ex post facto. Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17, 23 (1981)"[I]t must be retrospective, that is, it must apply to events occurring before its enactment, and it

must disadvantage the offender affected by it." Id. (footnote omitted).

[2] In this case SDCL 24-15-21 was not being applied retrospectively. Williams argues that the 1986 statute was being applied to his 1981 conviction or his 1984 parole. In reality, the 1986 statute was applied to his 1987 parole violation. SDCL 24-15-21, including the provision regarding the suspension of parole supervision time, was enacted and in effect before Williams was convicted of passing fraudulent checks in South Carolina. Thus the 1986 statute was not being applied to conduct which occurred before its enactment. There was no retrospective application and accordingly there is no valid ex post facto objection.

The issuance of the warrant in 1988 suspended the running of Williams' parole supervision time. The Board had authority to revoke Williams' parole.

WHETHER THE BOARD OF PARDONS AND PAROLES HAD AUTHORITY TO REDUCE WILLIAMS' GOOD TIME CREDITS.

[3] When Williams was convicted and sentenced the Board of Pardons and Paroles had no explicit statutory authority to reduce a parolee's good time credits because a parole violation. In 1983, SDCL 24-15-24 was amended to provide that if the Board determined a parole violation had occurred, "the board is authorized to order the reduction of time in full or in part for good conduct granted under § 24-5-1."

Williams was paroled in 1984. As a condition of his parole he signed a parole agreement in which he acknowledged that if he violated parole his good time credits could be revoked. Williams was found to have violated his parole and all six years of his good time credit were revoked. Williams argues that the Board had no authority to revoke his good time

credits absent the 1983 amendment of the statute. He argues that application of the statute was ex post facto.

The 1983 statute authorized the Board to reduce an inmate's good time credits for parole violations. This 1983 statute was enacted and in effect when Williams was paroled in 1984. Moreover, Williams agreed in 1984 that the Board of Pardons and Paroles could revoke his good time credit if he violated parole. Again, there was no retrospective application of the 1983 statute.

We affirm the decision of the circuit court.

WUEST and SABERS, JJ., concur.

HENDERSON and AMUNDSON, JJ., dissent.

HENDERSON, Justice (dissenting).

Though freedom is at stake, this is an administrative appeal under SDCL Ch. 1-26. It emanates from a final Order of the State Board of Pardons and Paroles. By the Order,

affirmed by the trial court, Willie Williams, III, a black man, imprisoned in the South Dakota State Penitentiary, is further incarcerated; this man's parole was purportedly revoked with this result: He loses 6 years "good time credits," which he deserved, under SDCL 24-15-24.

Essentially, two issues are framed under the facts of this case and fully briefed before us:

1. Did the revocation of Williams' parole, 6 months after the expiration of his sentence, violate his constitutional and statutory rights?
2. Applying SDCL 24-15-24, did the Parole Board unconstitutionally violate Williams' "good time" credits by the unconstitutional violation of an ex-post facto law?

SDCL 24-15-24, as amended, was enacted after the commission of the crime for which Williams was convicted. Ch. 201, 1983 S.D. Sess. Laws. This decision wrongfully approves of the board's action and the trial court's

decision. One, Williams' punishment is increased, which should not be because this statute is ex-post facto as applied to his case. Two, the Parole Board's order was entered over 6 months after his sentence expired; thus, the Board's action to re-incarcerate Williams was without legal authority. There is no evidence in the record to establish that Williams did not serve his time under the definition of "good conduct." Williams was first incarcerated on October 14, 1981. His "good conduct" release was, therefore, October 14, 1990.

SDCL 24-5-2 is important to our consideration. It provides:

> Whenever any inmate has been discharged under the provision of § 24-5-1 [good time conduct], he shall at the time of his discharge be considered as restored to the full rights of citizenship. At the time of the discharge of any inmate under the provisions of his chapter, he shall receive from the secretary or corrections a certificate stating that he has been restored to the full rights of a citizen. <u>If an inmate is on parole at</u>

> the time he becomes eligible for discharge the secretary of corrections shall issue a like certificate, which shall be due notice that such inmate has been restored to the full rights of a citizen. (emphasis supplied mine).

A hearing was held by the Board of Pardons and Paroles based on the 1987 "fraudulent check" conviction. This hearing took place on April 24, 1991. However, two days before this hearing, this Board found that Williams violated the terms of his parole. This, in itself, should prove fatal to the Board's case. Later, the Board said this was a "typographical error." Williams, under my thesis, still wins this appeal assuming there was a "typographical error." For, the South Carolina Court entered an order on April 16, 1991, which specifically provided:

> IT IS ORDERED that all records relating to such arrest and subsequent discharge pursuant to the above referenced section be dismissed, expunged and immediately destroyed and that not evidence of

> such records pertaining to such charge shall be retained by any municipal, county or state agency.

Williams' record of the 1987 "fraudulent check" charge does not exist. So how can the Parole Board build a revocation--and a reincarceration--on a crime that does not exist? It appears that the only evidentiary discourse, at the parole revocation hearing, came from Williams, who told the Board that the IRS seized his bank accounts because he was involved in a partnership in South Carolina. Therefore, he told the Board, his checks bounced. The fraudulent check charges resulted from this seizure; the South Carolina court set aside the conviction, in its entirety, and the Board should have recognized the South Carolina order. It did not. Although in good faith, the Board acted improvidently.

Enter the murder charge: Williams was charged with murder, convicted of murder,

incarcerated for murder, but the murder conviction was reversed. Said reversal was entered on or about the 7th day of January, 1991. On February 26, 1991, notwithstanding the above, the State Penitentiary sent a computer message to the Charleston County Jail imploring the South Carolina authorities to hold Williams and expressed, with gusto, that this was a "no bond situation."

Examining the dates, it appears the Board of Pardons and Paroles revoked Williams' parole based upon a conviction which did not exist. Pointedly, the fraudulent conviction ceased to exist on April 16, 1991, and the Board revoked the parole on April 26, 1991 (under the "typographical error" theory). Thus, a miscarriage of justice exists. There can be doubt, at least in the mind of this writer, that such an error constitutes plain error and a reversal of the Board and the trial court is now mandated. SDCL 23A-44-15

provides:

> Plain errors or defects affecting substantial rights may be noticed although there were not brought to the attention of a court.

See also, State v. Lewandowski, 463 N.W.2d 341 (S.D. 1990) and State v. Brammer, 304 N.W.2d 111 (S.D. 1981).

For benefit of the reader, the salient facts are:

1. Williams was convicted of Rape in South Dakota in 1981.

2. Williams was paroled in December 1984.

3. Williams was convicted of "fraudulent checks" in South Carolina on August 21, 1987.

4. The Board of Pardons and Paroles issued a warrant for Williams' arrest for alleged parole violations on February 2, 1988.

5. Under the "good conduct" provisions of the South Dakota statutes, Williams' sentence for the 1981 rape conviction was fully satisfied on October 14, 1990.

6. In late February or early March 1991, Williams was arrested in South Carolina under the 1988 warrant. Williams was returned to South Dakota in early April 1991.

7. On April 16, 1991, a South Carolina court expunged Williams' record of the 1987 "fraudulent check" conviction.

8. The Board of Pardons and Paroles held a hearing on whether to revoke parole and entered an order revoking parole on April 26, 1991 based on the 1987 "fraudulent check" conviction.

Under the applicable law, and the circumstances of this case, the issuance of an arrest warrant for an alleged parole violation did not toll the running of Williams' parole supervision time.

Per SDCL 24-5-2, if the running of Williams' sentence was not tolled for some reason, Williams' sentence was fully served on October 14, 1990. If a sentence is fully served, the Board of Pardons and Paroles no longer has authority to incarcerate a convict, nor may they revoke his parole or take away any good time credit. See generally, 59 Am.Jur.2d Pardons & Paroles § 113. This is not disputed by the Board of Pardons and Paroles. But the ultimate quest in law does

not end there.

Board of Pardons and Paroles contends, when they issued the February 2, 1988 warrant for Williams' arrest, the running of his sentence was tolled. They rely on SDCL 24-15-21. SDCL 24-15-21 currently provides:

> If the executive director of the board is satisfied that any provision of § 24-15-20 has been violated, the executive director may issue a warrant to the warden of the penitentiary, any law enforcement officer, or any parole agent, directing that the parolee named be arrested and returned to the state penitentiary under the terms of his original conviction and sentence pending a hearing on the alleged violations. Upon the issuance of the warrant, the running of the parole supervision time shall be suspended until the board has entered its final order on the revocation. The board shall credit the inmate with time spent in custody as a direct result of the parole violation (emphasis supplied mine).

A problem arises because that version of SDCL 24-15-21 was not enacted until 1986, five years after Williams was convicted and two years after he was paroled. The version of the statute in effect when Williams was

convicted and paroled did not contain that very important sentence which would operate to automatically toll the running of a parolee's sentence if a warrant was issued for his arrest. Resultantly, the states in effect at the time of Williams' conviction and parole was insufficient in this regard. To correct that insufficiency, the State Legislature amended SDCL 24-15-21 in 1986 by adding the sentence emphasized above.

Williams argues that the application of that 1986 version of the statute to him is a violation of the ex post facto prohibitions in the United States Constitution.

The United States Supreme Court has stated that the United States Constitution's two provisions regarding ex post facto laws prohibit the federal and state legislatures from enacting any law, "which imposes a punishment for an act which is not punishable at the time it was committed; or imposes

additional punishment to that then prescribed." Weaver v. Graham, 450 U.S. 24, 28 101 S.Ct. 960, 963, 67 L.Ed.2d 17, 22 (1981) (emphasis added) citing Cummings v. Missouri, 71 U.S. (4 Wall) 277, 18 L.Ed. 356 (1867). Therein, Williams now impaled, should be extracted from the minions of the law.

Supreme Court cases of older vintage list general categories of statutes which constitute ex post facto laws. However, in recent cases the Supreme Court has applied a more straightforward analysis when faced with ex post facto claims.

> Our decisions prescribe that two critical elements must be present for a criminal or penal law tc be ex post facto; it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affect by it.

Weaver, 450 U.S. at 29, 101 S.Ct. at 964, 67 L.Ed.2d at 23 (footnotes omitted).

When Williams was convicted and paroled the issuance of a warrant for parole violation

as ex post facto manner. I agree.

conferee if was inconsistently applied in retrospectively to his disadvantage. Thus, he will assume conferee that the law was applied retroactively to his detriment, Williams, parole was revoked. Thus, he is paid made to serve more time than he could have been made to serve it the prior sentence. Under the statute had been applied. would not have been made to serve it the Board of Pardons and Paroles applied the time credit. Rather, and wrongfully, the April 1991 or striped him of six very good behavior to 1991 on October 31, 1990. Consequently, the served on parole and would have been continued to run and would have been fully on parole and would have been continued to run and would have been vacated and paroled, his sentence sentence. Under the law it effect is the time a to paramount the had not automatically fall

Hence, the 1986 statute was applied in an ex post facto manner. Williams, sentence was not fully and therefore expired on October 14, 1990. On that date, the Board of Pardons and Paroles had no authority to revoke his parole. Accordingly, the circuit court should be reversed because the said Board acted outside of the rule of law.

When Williams was convicted and sentenced, the Board of Pardons and Paroles had no explicit statutory authority to revoke a parole, a good time credits for a parole violation. In 1983, SDCL 24-12-24 was amended to specifically provide that it the Board of Pardons and Paroles determined a parole violation had occurred, "...the board is authorized to order the reduction of time in full or in part for good conduct during such § 24-2-1."

Williams was paroled in 1984. As a condition of his parole, he signed a parole

agreement in which he acknowledged that it did have time credits parole was violated did poop time credits could be revoked.

True, Williams was found to have violated did poop time for six years to did poop time for six years of did poop time credits were revoked. Williams contends, however, that the Board of Pardons and Paroles had no authority to revoke did poop time credits gained the 1981 amendment of the credits. He argues that application of the statute was ex post facto. I agree.

Without the 1981 statute, the Board of Pardons and Paroles had no authority to take away poop time credits. Under the law in effect at the time Williams was convicted, the worst scenario for Williams was that he could have did parole revoked. When the 1981 statute was applied to him, Williams had did time credits revoked and had six years to poop time credits earned. Being entitled to did poop time credits, Williams has to serve six

extra wage continement that could not have been imposed without the 1861 statute. In my opinion, that is wrong. Williams, contention that the 1861 statute was applied in a retrospective manner, thus alleviating the prison from a lot more bond wages, is correct. It must be held to have been void ab initio and a wage bond time credits. I feel for Williams Williams, III, and hereby, in my limited way, I champion his legal cause, believing it is meritorious.

If might be argued, as a legal premise, that Williams agreed that the Board could take away his bond time credits it be violated prior. Where, however, under the state of record, as pertains to the alleged violations of parole, has Williams done so? Voluntarily chooses parole did not give the Board the right to act beyond the law which gave the Board the discretion and constitutional and right to revoke his

afforded civil rights. With this, my reflections are at end. I wish them well and say, in conclusion that this man is entitled to his freedom.

CAVEAT

"For whom the Bell Tolls,

It we want privateers to change, public officials forced privateers and exercise many other changes. We have some privateers must change. We have some community efforts placed there times in this country but with them exceptions it will and established and not will organized and them of the participants are will trained.

Delivery of Justice at 318.

collectively, we take on a moral burden and we but a person behind walls and

that burden is to drive him or her a
chance to change.

Delivery of Justice at 355.

MORE WAREHOUSES, OR FACTORIES WITH FENCES?

Reward and punishment permeate the
lives of all free people and they should
not be denied to prison inmates. Central
to the American system is the idea that
good performance is rewarded and poor
performance is not.

Delivery of Justice at 345.

Willie Williams, Performance in Prison was
good. He deserves his good time credits.

I am authorized to affix that Justice
ANDERSON joins this dissent on Issue II,
pertaining to the ex post facto law, and that
he would reverse on that point.

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*Lecture at University of Nebraska,
Lincoln, Nebraska, December 15, 1981, by Chief
Justice Warren E. Burger.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 93-3083SDSF	
MILLIE MILLIAMS, III,	*
	*
Appellee,	*
	*
v.	*
	*
STEVEN M. LEE, Warden,	*
South Dakota State	*
Penitentiary, and	*
MARK W. BARNETT,	*
Attorney General, State	*
of South Dakota,	*
	*
Appellants.	*

ORDER DENYING PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 20, 1994

Order Entered at the Direction of the Court:

/s/ MICHAEL E. GANS

Clerk, U.S. Court of Appeals, Eighth Circuit